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Critical legal 'method' as attitude

Panu Minkinen

On method

Writing about a 'critical legal method' with which to address the question of lay participation in law proves to be problematic for a number of different reasons.

What does 'critical' mean in this context?

For one thing, 'critical judgement' is a generic intellectual skill that all researchers are supposed to be able to apply in relation to the object of their research. For example, the Bologna Process Qualifications Framework includes amongst the skills required at the third cycle (i.e. the doctoral level) the capacity for "critical analysis, evaluation and synthesis of new and complex ideas".¹ In this sense all research at the doctoral level is expected to be 'critical'.

But 'critical analysis' as a generic research skill can hardly pass for what we mean by a 'critical method' in this instance. The latter implies a more radical and focused perspective to the matter at hand. We can, for example, imagine a researcher who rejects the internal perspective that, according to the legal positivist HLA Hart, was the 'properly' legal perspective.² Internally viewed in Hart's sense the legal system will always appear as a fundamentally legitimate way of regulating society. Like a participant in a game we are required to acknowledge the rules if we want to play. And so the researcher will be stuck with tinkering with minor reforms that may or may not improve whatever political ends lay participation was intended to achieve. But adopting an external perspective, that is, an approach that is not 'properly' legal in Hart's sense, will emancipate the researcher from her obligations towards the law. It allows her to, for example, evaluate lay participation in relation to democratic ideals that are not extracted from the law itself. We could argue that the commitment to an internal perspective that Hart and his positivist followers demand of the legal researcher makes us blind to social and political practices that we as critics

¹ See http://www.bologna-bergen2005.no/EN/BASIC/050520_Framework_qualifications.pdf.

² H.L.A. Hart, *The Concept of Law* (2nd edn Oxford University Press, Oxford 1997) 88-91. See also Scott J. Shapiro, 'What Is the Internal Point of View?' (2006) 75 Fordham Law Review 1157-70.

should become aware of. It is in this very sense that the German political philosopher Jürgen Habermas claimed that the motivation or 'knowledge interest' of all critical research is 'emancipatory':

The methodological frame which settles the meaning of the validity of this category of critical statements can be explained in terms of the notion of self-reflection. This frees the subject from dependence on hypostatized forces. Self-reflection is influenced by an emancipatory concern with knowledge ...³

Habermas's notion of critical research as self-reflection with an emancipatory objective comes already close to the political connotations that we associate the word with today. In common usage 'critical' often refers to a practice of 'criticism', something that the German political philosopher Theodor Adorno somewhat pejoratively described as "judging intellectual phenomena in a subsumptive, uninformed and administrative manner and assimilating them into the prevailing constellations of power which the intellect ought to expose."⁴ In other words, 'criticism' can be a rather simplistic albeit well-meaning attempt to rectify social wrongs that is motivated by the researcher's personal commitments rather than any academically informed encounter with society. In the eyes of the legal orthodoxy this personal and 'subjective' commitment makes critical research suspect.

But if we understand the word 'critical' as something relating to 'critique' rather than 'criticism', then we seem to be back at square one. Wouldn't all research need to be 'critical' as the etymology of the word already indicates?⁵ Isn't 'critiquing' the very definition of all legal research worth its name?

³ Jürgen Habermas, 'Knowledge and interest' (1966) 9 *Inquiry: An Interdisciplinary Journal of Philosophy* 285-300, 294.

⁴ Theodor W. Adorno, 'Cultural Criticism and Society', *Prisms*. Trans. SM Weber and S Weber (MIT Press, Cambridge, MA 1984) 30.

⁵ The etymology of both 'critique' and 'criticism' is from the Greek verb *krinein*, 'to set apart', 'to discern', 'to judge'.

A further problem arises from the breadth of our critique. Is it enough to investigate 'critically' the object of our research, lay participation in law in our case? For if we are to adopt a truly critical position, then wouldn't remaining consistently critical require us to also address the limitations of the various 'methods' or perspectives that are at our disposal? And wouldn't this have to include any 'critical legal method' itself? Can a 'critical' perspective in the more substantive meaning alluded to by Adorno have a 'method' to begin with?

The somewhat illusory idea of a coherent 'critical legal method' is reinforced by the notion that there is a 'movement' behind it. Just like a socio-legal method presumes a corresponding movement, be it socio-legal or the sociology of law, a critical method seems to refer to some similar movement that is identifiably 'critical'. The modern story of critical research in law is often compressed into a Critical Legal Studies (CLS) movement that supposedly reflects what contemporary 'critiquing' is all about.⁶ But one could also well claim that the CLS movement was never really a proper 'movement'. It was, rather, a community of loosely affiliated individuals who worked mainly in North American law schools from the late 1970s to the mid 1980s representing various non-doctrinal approaches. Although CLS researchers were politically all clearly left-of-centre, their political kinship was never enough to consolidate the various approaches into a 'method'. Instead there were 'methods', ranging from Marxist⁷ and feminist⁸ to deconstruction,⁹ that were often incompatible with each other.

⁶ Textbooks and readers will often include a section on the CLS. On CLS generally, see e.g. Roberto Mangabeira Unger, 'The Critical Legal Studies Movement' (1983) 96 Harvard Law Review 561-675, Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, Cambridge, MA 1987), Mark Tushnet, 'Critical Legal Studies: An Introduction to Its Origins and Underpinnings' (1986) 36 Journal of Legal Education 505-17 and Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 Yale Law Journal 1515-44.

⁷ E.g. William J. Chambliss, *Law, Order, and Power* (2nd edn Addison-Wesley, Reading, MA 1982).

⁸ E.g. Catharine A. MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 Signs 635-58.

As two leading figures of the 'movement', Duncan Kennedy and Karl E. Klare, say in an early CLS bibliography (a valuable research tool in itself):

CLS scholarship has been influenced by a variety of currents in contemporary radical social theory, but does not reflect any agreed upon set of political tenets or methodological approaches. Quite the contrary, there is sharp division within the CLS movement on such matters. CLS has sought to encourage the widest possible range of approaches and debate within a broad framework of a commitment to democratic and egalitarian values and a belief that scholars, students, and lawyers alike have some contribution to make in the creation of a more just society.¹⁰

The starting point of this chapter is the claim that all legal methods, be they conventional or allegedly 'critical', impose limitations into the ways in which the researcher produces legal knowledge. In scientific practice a method is a mechanism with which, amongst other things, the personal and 'subjective' views of the researcher are supposedly filtered out producing allegedly 'objective' knowledge. 'Methodologically' conducted research does not produce mere opinions but, so the argument runs, scientifically valid knowledge. A 'critical legal method', if there is such a thing, would, then, be no different. Textbooks in the area¹¹ are cluttered with the nomenclature of acceptable frameworks for critical 'methods', and in its insistence on complying with them,

⁹ E.g. Jack M. Balkin, 'Deconstructive Practice and Legal Theory' (1987) 96 Yale Law Journal 743-86.

¹⁰ Duncan Kennedy and Karl E. Klare, 'A Bibliography of Critical Legal Studies' (1984) 94 Yale Law Journal 461-90, 461-2. A similar critical bibliography was compiled for at least international law. See David Kennedy and Chris Tennant, 'New Approaches to International Law: A Bibliography' (1994) 35 Harvard International Law Journal 417-60.

¹¹ E.g. Ian Ward, *Introduction to Critical Legal Theory* (2nd edn Cavendish Publishing, London et al 2004) and Costas Douzinas and Adam Gearey, *Critical Jurisprudence. The Political Philosophy of Justice* (Hart, Oxford 2005).

critical legal research can often be just as orthodox in its approach as its more conformist cousins. It seems that it is, indeed, next to impossible to be 'critical' of the 'critical' without turning into a reactionary.

This chapter will try to argue that the essence of 'critique' makes the very idea of a 'legal method' problematic, and that a 'critical' perspective to law can only be more like an 'attitude' than a scientifically motivated methodic approach. Without reverting back to the 'anything goes' of Paul Feyerabend's methodological anarchism¹², I will, however, try to show how the insistence on following methodological rules guides the production of legal knowledge towards the conformity of legal orthodoxy, and this would apply to a 'critical' method just as well as to any other. In this sense the aim of this chapter is 'emancipatory'. And curiously enough, I will further argue that an awareness of tradition will provide one way of breaking away from that conformity.

'Before you can break the rules, you have to know what the rules are.'

My own doctoral thesis was criticized for the emphasis that it put on 19th and early 20th century German jurisprudence. At least to some extent, that emphasis has remained in my subsequent work. But the 'dead German men' are there for a reason. They are present in my work because they represent a tradition that I am trying to break away from. It is the 'baggage' of tradition that even a critic inevitably carries with her. Because to be critical is always to be critical of something, and as long as a given approach maintains a critical relationship with whatever it is a departure from, then the tradition will impose itself on the critical researcher in one way or another.

The possible benefit of such encounters with 'dead German men' is to better understand how that tradition imposes itself on the legal researcher in general and, in this case, on the critical legal researcher in particular. Understanding the tradition will not, perhaps, be able to immediately determine

¹² Paul Feyerabend, *Against Method* (4th edn Verso, London and New York 2010).

what a critical legal perspective to lay participation in law is or ought to be, but it will hopefully be able to point to possible ways of departing from an orthodoxy than dominates legal research and, at the same time, to also reduce the risk of being segregated into a critical ghetto reserved only for the like-minded. The critical legal researcher will always run the risk of being either 'defined in' or 'defined out', of being either absorbed and neutralized by her political adversaries or excluded into a meaningless and ineffectual existence outside of what is regarded as valuable academic work.¹³ But an approach that will be able to address the legal tradition on its own terms will hopefully also identify avenues for critical departures that remain relevant.

Indeed, calls for critical departures in law are often explicitly spelled out with reference to tradition. This can be illustrated with the help of two hypothetical questions that, no doubt, most critically minded legal researchers have encountered in one form or another. Firstly, how do we overcome tradition? And secondly, how can we change law?

The first question, now reformulated within the framework of this chapter – How can critical legal research overcome tradition? – is in fact rhetorical in so far as it also presents at least two claims. Firstly, it suggests that it is necessary to overcome tradition, if not in its entirety, then at least selectively. To be critical in legal research is often understood as being critical of a traditional way of doing things. But secondly, the claim also implies that there is something in tradition that resists the necessary change. Even if the need for another approach may well be recognized, tradition presents itself as an impediment, and it will want to have its say before the overenthusiastic critic causes any serious damage. In other words, the question 'How can critical legal research overcome tradition?' is articulated in the tension between the demands of the future and the obligations to yesteryear.

The second question, once again reformulated – How can critical legal research change law? – could perhaps be inferred from the first. Once the need for change and the possible obstacles have been recognized and identified, the

¹³ See Thomas Mathiesen, *Law, Society and Political Action. Towards a Strategy under Late Capitalism* (Academic Press, London 1980) 224-6.

critic would only need to find out how the required changes can come about. But if this second question was understood so literally, the reply would be much too tautological. For the critic could then simply answer: 'Law can be changed by researching it in a critical way.' However, even the second question is rhetorical. It also implies that something resists, that the researcher's 'traditional' way of doing things somehow obliges, and that it is not simply a matter of 'doing critical legal research' but, perhaps, of 'correcting previous mistakes', of moving forward from somewhere rather than uprooting oneself completely. Perhaps in a way that is similar to the judiciary's commitment to 'piecemeal reform', to use Joseph Raz's famous expression¹⁴, the legal researcher is expected to respect the democratic mandate of the legislator and to move forward with caution.

What the two questions have in common, however, is the notion that the tradition of law 'obliges', that it is, in a manner of speaking, a 'normative' tradition. A normative tradition requires adherence to, and anyone wishing to do critical research in law will sense this. And it is the normative nature of that tradition that this chapter will take up in more detail. How does the normative tradition of law display itself? What is the way in which it expresses its obligations to the legal researcher? How should the legal critic respond?

These questions will first be examined with an overview and interpretation of Hans Kelsen's (1881 – 1973) main contribution to law, namely the pure theory of law. Kelsen published two editions of the book: a short first edition in 1934¹⁵ and a considerably enlarged second edition in 1960 that this chapter will mainly draw on.¹⁶ In addition, many other works by Kelsen contribute towards the overall theory.¹⁷ By emphasizing the epistemological

¹⁴ Joseph Raz, *The Authority of Law. Essays on Law and Morality* (2nd edn Oxford University Press, Oxford 2009) 196.

¹⁵ Hans Kelsen, *Introduction to the Problems of Legal Theory* [1934]. Trans. BL Paulson and SL Paulson (Clarendon Press, Oxford 1992).

¹⁶ Hans Kelsen, *Pure Theory of Law*. Trans. M Knight (University of California Press, Berkeley, CA 1967).

¹⁷ For example, the subtitle of Kelsen's book on sovereignty from 1920 is 'a contribution to a pure theory of law.' Hans Kelsen, *Das Problem der*

dimensions of Kelsen's theory, I will focus on the way in which the pure theory of law defines its 'logical' framework. My claim is that it is the particular way in which Kelsen understands logic that accounts for the normativity of the tradition that he both establishes and represents.

Why Kelsen?

The pure theory of law and the legal positivism that claims to be its successor establish a tradition that we, as legal researchers, are expected to follow. It is the doctrinal or 'black letter' default position from which other approaches in legal research are regarded as deviations and departures. Methodological norms and, more generally, the very requirement to apply a method to legal research are typically at the heart of this normative tradition that we are supposed to honour.

Finally, this chapter will suggest an alternative understanding of tradition, inspired by Hans-Georg Gadamer's (1900 – 2002) philosophical hermeneutics, that would enable critical departures from the tradition without having to fall back on the naïveté of criticism that Adorno was referring to.

Law and knowledge

It would be difficult to overestimate the influence of neo-Kantian philosophy in the German tradition of legal positivism. Oversimplifying grossly, the neo-Kantians wanted to establish a scientifically valid way of investigating social and cultural phenomena such as law so that the resulting humanities and social sciences would not have to pale in comparison to their natural science counterparts. In many ways, neo-Kantianism in law was the final blow that ended the era of natural law that had been losing ground in legal thinking ever since the heyday of Hegel.¹⁸ And Kelsen was the most prominent of the neo-

Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre [1920] (Scientia, Aalen 1981).

¹⁸ There was, however, a revival of natural law thinking in post-war Germany even if its effects were not lasting. This was, perhaps, most evident in

Kantian lawyers although his affiliations with the Marburg school of the movement are slightly more complicated than my argument here would imply.¹⁹ Nevertheless, Kelsen's pure theory of law set the theoretical stage for the subsequent developments in modern law on the European mainland. Although Kelsen's immediate influence is, perhaps, more easily detectable in continental European or South American legal cultures, Anglophone legal theorists have also presented their interpretations although the local variant of legal positivism is quite different.²⁰

How does the pure theory of law define itself? Although Kelsen rarely uses the term 'philosophy of law' but instead speaks of either 'legal doctrine' or the 'science of law', the aims of the theory are clearly defined in a philosophical tone:

As a theory, its exclusive aim is to know and to describe its object. The theory attempts to answer the question what and how law is, not how it ought to be. It is a science of law (jurisprudence), not legal politics.²¹

In order to be able to appreciate the full significance of Kelsen's undertaking, it is worth keeping in mind — and perhaps even emphasizing — that the pure theory of law is essentially an epistemological project. Its aim is not primarily to provide judges or other legal actors conceptual tools for their decisions or

the 'turn' of Gustav Radbruch, a neo-Kantian jurist and contemporary of Kelsen. See e.g. Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26 *Oxford Journal of Legal Studies* 1-11.

¹⁹ See e.g. Stanley L. Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' (1992) 12 *Oxford Journal of Legal Studies* 311-32.

²⁰ See e.g. Hart, *The Concept of Law*, 292-7 which are the footnotes to the central Chapter VI, and Joseph Raz, *The Concept of a Legal System. An Introduction to the Theory of Legal System* (2nd edn Clarendon Press, Oxford 1980) 93-120.

²¹ Kelsen, *Pure Theory of Law*, 1. The original German text makes no reference to 'jurisprudence' which has been added by the translator.

interpretations as the more doctrinal readings of Kelsen have often implied. In the long run, a more scientific and logical exposition of the law may well benefit both legislators and judges, but this is merely a happy consequence. *The sole purpose of the pure theory of law is to identify its objects of research, that is, legal norms, and to describe them in a scientifically valid way.* Within its overall neo-Kantian framework, one could even claim that the aim of the pure theory of law is not to address an ontological question ('What is law?') at all as Kelsen's preamble quoted above seems to suggest but to determine the epistemological preconditions of a science of law. Law, then, doesn't 'exist' as such, or, more precisely, the possible 'existence' of law is subordinate to the preconditions of knowing about it. So implicitly Kelsen rephrases his initial question about the 'what' of law thus: 'How must we conceptualize law in such a way that its scientific study would be possible?'

Kelsen is obviously captivated by the possibility of knowing about law in a scientific way. He seems to be well aware of the doubts and concerns that have been expressed about the scientific status of law, and he acknowledges that law has often been accused of its lack of methodological precision and consistency. The adversaries in Kelsen's dispute are defined in a neo-Kantian manner as advocates of an impure 'methodological syncretism' which alludes to controversies in theology:

The Pure Theory of Law undertakes to delimit the cognition of law against these [PM: other non-legal] disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines (methodological syncretism) which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter.²²

²² Kelsen, *Pure Theory of Law*, 1. See also Deryck Beyleveld and Roger Brownsword, 'Methodological Syncretism in Kelsen's Pure Theory of Law' in SL Paulson and BL Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press, Oxford 1998).

Kelsen claims, then, that it is the ‘subject matter’ of the discipline — legal norms — that prescribes its method. In order to literally ‘purify’ law from alien influences, it must be ‘liberated’ from everything that does not belong to its object of study, that is, legal norms. This ‘liberation’ is curious in the sense that it implies a past and bygone era before law had entangled itself with the two main problems that Kelsen identifies, namely the causal explanatory models of the natural sciences and the ‘ideological’ framework of the social sciences²³. It is, of course, clear that no such ‘Golden Age’ of law exists.

As mentioned, Kelsen’s epistemological undertaking is essentially neo-Kantian. For Kant, the description of the legal norms of an organized society would not have constituted knowledge in the strict sense of the word at all because norms cannot be explained through causal relations. In Kantian terms a legal norm belongs to the world of practical reason where an effect comes about autonomously because it is willed. For example, morality does not come about as the effect of a cause but because man wills it autonomously and freely: I act in a morally significant — good or bad — way because I ‘will’ to do so, not because my environment compels me to do so. And one cannot ‘know’ about this domain of freedom, only ‘think’ it. This was the claim that the neo-Kantians wanted to refute by either expanding Kant’s notion of theoretical reason and knowledge into a universal epistemology to cover even normative phenomena (the Marburg approach) or by developing the epistemological preconditions of a ‘third approach’ of cultural sciences somewhere between theoretical and practical reason (the Heidelberg or Baden approach).²⁴ But for Kelsen the normative structure of society seems to be much more than an isolated social phenomenon amongst others. Perhaps one could go so far as to claim that Kelsen regards legal norms significant because their normativity enables the scientific description of society as a whole:

²³ Kelsen, *Pure Theory of Law*, 75-6.

²⁴ On the political and historical significance of neo-Kantianism, see Chris Thornhill, *German Political Philosophy. The Metaphysics of Law* (Routledge, Abingdon 2007) 239-60.

If it is said that a certain society is constituted by a normative order regulating the mutual behaviour of a multitude of men, one must remain aware that order and society are not two different things; that they are one and the same thing, that society consists in nothing but this order, and that, if society is designated as a community, then essentially that which these men have 'in common' is nothing else but the order regulating their mutual behaviour.²⁵

In other words, the normative order is society and vice versa. But regardless of the claims that the pure theory of law makes about its aims at the outset, Kelsen then proceeds to reassess his task in ever more epistemological terms: in order to be able to describe that society in a scientifically valid way, society must be understood as a normative order.

The specificity of law can, Kelsen claims, be described using Kant's fundamental distinction between the 'is' and the 'ought', between what is factual and what is normative. The distinction also provides the criterion with which we can distinguish law as a discipline from the natural sciences. If Kant claimed that knowledge was possible only within the causal relations established by the laws of nature, Kelsen is a typical neo-Kantian in the sense that he is trying to extend the main claims of Kant's critical method to the study of normative phenomena. This is what makes the pure theory of law scientific. But in a legal science, social relations cannot be understood through the causes and effects of the natural sciences because they are exclusively normative phenomena.²⁶ For Kelsen, then, the normativity of law requires a specific form of knowledge.

The logic of science

But even if the object that the pure theory of law studies is normative, scientific knowledge is not. Nor can it be. For Kelsen the requirement that scientific

²⁵ Kelsen, *Pure Theory of Law*, 86.

²⁶ Kelsen, *Pure Theory of Law*, 76.

knowledge must be 'objective' precludes any normative commitment to the object of study even if the final results may call for reform and allow for conclusions *de lege ferenda*. We can, for example, only commit ourselves to combatting climate change after 'objective' research has verified the phenomenon. Similarly, according to the same logic, we can commit ourselves to improving the participation of lay persons in legal decision-making only after 'objective' research has verified that lay persons are, indeed, excluded.

So how can one be objective about something that is in essence a norm?

Kelsen tries to resolve the issue by making a distinction between a legal norm and what has been translated as either the 'rule of law' or, more appropriately, the 'reconstructed legal norm' or 'legal proposition'.²⁷ A legal norm is a command or an imperative, and it is also the sole object of the pure theory of law. The legal proposition, on the other hand, is an objective description of the legal norm, and it commands nothing. The legal proposition merely associates a possible act with a possible sanction and prepares the legal norm for scientific description. Even if the legal norm is the pure theory's object of research, it cannot be identified with law as the theory understands it. The pure theory of law describes its objects, that is, legal norms, through legal propositions, but in the latter the normativity of the 'ought' serves merely a descriptive purpose. The legal proposition, on the other hand, can only describe the normative relationship of the 'ought' between act and sanction.

How would this work in practice?

The legal norm commands or entitles to associate a sanction with an act: 'If act *x*, then sanction *y* ought to follow.' For example, the crime of theft ought to be followed by the sanction that is prescribed by law. But as a descriptive science, the pure theory of law cannot 'endorse' the strong normativity of the legal norm ('If you steal, it is right and just that you ought to be punished in accordance with the law.') but can only describe the normative content of the legal norm through the legal proposition ('The law regarding theft that Parliament has passed states that if you steal, you ought to be punished in

²⁷ On the problem of translating Kelsen's term *Rechtssatz*, see Kelsen, *Introduction*, 23, footnote 0.

accordance with the law, but as a science that merely describes these norms the pure theory has no view as to whether you should or shouldn't.):

The jurist who describes the law scientifically does not identify himself with the legal authority enacting the norm. The rule of law [PM: the legal proposition] remains objective description; it does not become prescription. The rule [PM: the legal proposition] does no more than state, like the law of nature, the link between two elements, a functional connection.²⁸

Legal norms do not come about 'naturally' as effects of a cause but are 'willed' and are so created in an act. In other words, the existence of a will is always a precondition of law. But for Kelsen such an act is always a factual phenomenon whereas the outcome of a legislative will, that is, the legal norm, must necessarily be normative. Because in Kelsen's neo-Kantian framework one cannot bridge the worlds of the 'is' and the 'ought', of factuality and normativity, a legal norm cannot be inferred from the will that has created it.²⁹ Consequently the validity of a legal norm cannot be inferred in a scientifically acceptable way from the legislative will that has enacted it ('The law of theft is valid law because Parliament has so decided.'). Law can only exist if the legislator has willed it, but that is not the source of its validity. It is valid if and only if its legislator had the legal competence to do so:

... the norms, whose reason for validity is in question, originate from an authority, that is, from somebody competent to create valid norms; this norm bestows upon the norm-creating personality the 'authority' to create norms. The mere fact that somebody commands something is no reason to regard the command as a 'valid' norm, a norm binding the individual at whom it is directed. Only a competent authority can create

²⁸ Kelsen, *Pure Theory of Law*, 79.

²⁹ Kelsen, *Pure Theory of Law*, 4-6.

valid norms; and such competence can only be based on a norm that authorises the issuing of norms.³⁰

This is the point from which Kelsen constructs his infamous *Stufenbau*, the hierarchical and layered structure of higher and lower legal norms that accounts for the normativity of all legal norms. The validity of a lower norm can only be inferred from a competence to enact that norm that was authorized by a higher norm. For example, local government is authorized to make byelaws concerning the prevention of nuisances only because the Local Government Act 1972, a law enacted by Parliament, authorizes local government to do so. So a byelaw regulating the use of skateboards in public parks is valid as a legal norm because a higher law, the Local Government Act 1972, grants local government the legal authority to regulate such issues. Parliament, on the other hand, can give local government this delegated authorization through the Local Government Act 1972 in a valid way only because a constitution establishes the legislative powers of Parliament. In this way, lower and higher norms are always in a logical relation to one another. In order to be normatively valid, a norm must always refer logically to a higher norm of competence. Hence: 'The law of theft is valid law because Parliament that enacted it had the constitutional competence to do so.'

But this logical hierarchy cannot be followed through *ad infinitum*. Indeed, the constitution provides the ultimate framework for legal norms from which the validity of lower norms can be logically inferred. As far as positive law is concerned, there cannot be anything above the constitution. But in order for the pure theory of law to meet the scientific criteria that Kelsen has set for it, even the highest positive norms must logically infer their validity from something higher.

So what could possibly be above the constitution? Surely not God or natural law if we are to take scientific objectivity as a starting point.

In order to comply with the demands of his own theory and to avoid the abyss of eternal regression, Kelsen then makes a distinction between the

³⁰ Kelsen, *Pure Theory of Law*, 194.

constitution in its material or positive meaning and the constitution in its formal or logical meaning. The constitution in its logical meaning includes within itself a *basic norm* that the pure theory of law must presuppose in order to remain scientific. All normativity in law flows from it. The basic norm is the normative foundation of the act of positive legislation.³¹

Time and time again Kelsen emphasizes that the basic norm does not involve the recognition of any ethical standard that is transcendent in relation to positive law. So it does not and cannot measure the acceptability of positive law. In other words, the basic norm cannot be a foundational norm of natural law as many of Kelsen's readers have attempted to either understand it or to criticize it. The basic norm is only an epistemological necessity. It is the 'transcendental-logical' precondition of the pure theory of law. The basic norm is not 'willed' in the same way as conventional legal norms, but it is required by the science of law. By presuming the existence of the basic norm, the pure theory of law establishes and fixes its own normative logic and its scientific validity.³²

It is, however, problematic to insist on such a sharp distinction between 'willing' and 'presuming'. Could we not say that the pure theory of law legislates its own basic norm? In 1963, only three years after the publication of the enlarged second edition of his book, Kelsen had to revise his own position on the basic norm. Kelsen was originally uncomfortable with what the neo-Kantians called 'fictions'.³³ In neo-Kantian epistemology, a fiction is a heuristic conceptual tool that enables one to conceive of something as knowledge. It is the equivalent of Kant's 'as if' (*als ob*) postulate that even Kelsen himself makes a reference to.³⁴ But now, in order to account for the 'non-willed' basic norm, Kelsen must resort to a 'double-fiction':

³¹ Kelsen, *Pure Theory of Law*, 200.

³² Kelsen, *Pure Theory of Law*, 201-5.

³³ See Kelsen, *Pure Theory of Law*, 299-302.

³⁴ Hans Kelsen, *Reine Rechtslehre* (2nd edn Verlag Österreich, Wien 2000) 99. This is one of the many footnotes that have been omitted from the English translation. A typical legal fiction would be corporate personhood that enables legal thinking to conceive of the rights and obligations of corporations.

The basic norm is a fictive norm, and it requires a fictive act of will that posits the norm. It is a fiction according to which some authority wills the norm to exist.³⁵

In this case, the fictive nature of the basic norm itself as a 'transcendental-logical presumption' is fairly easy to fathom because it is not part of positive law itself. We must simply assume 'as if' the basic norm existed, for otherwise the normativity that the pure theory of law is trying to scientifically describe would be impossible. But in order to establish the scientific validity of the theory, Kelsen must now also postulate a fictive will 'as if' an authority enacted the basic norm. But clearly this authority is not fictitious at all. It can only be the pure theory itself. Through its own allegedly fictive authority, the theory establishes its own object of research by enacting the basic norm, and normativity, the supposedly constitutive element of all social life, cannot exist outside its realm.

How we 'ought' to do legal science

The critics of traditional legal approaches may not wish to engage with Kelsen's pure theory because, even if he was a socialist who openly sympathized with the women's rights movement and psychoanalysis in pre-war Vienna, his special brand of legal positivism apparently has precious little to say about the social and political concerns that usually animate the critical research of law. And as a primarily epistemological project concerned with its own scientific status, it does not lend itself easily to any methodological diversions. Even more poignantly, legal critics may wish to deliberately avoid Kelsen because of the way in which the pure theory of law establishes a normative tradition that, in the guise of knowledge and science, tacitly delimits the possibilities of critical legal research. It serves as a model of the way in which the orthodoxy of the positivistic tradition in law in general regulates the production of legal knowledge.

³⁵ Kelsen, as quoted in Franz-Martin Schmöltz (ed), *Das Naturrecht in der politischen Theorie* (Springer, Wien 1963) (my translation).

But conversely, legal critics may wish to deliberately engage with the pure theory of law — or any other tradition, for that matter — in order to be able to better understand how a given tradition imposes limits and regulates legal research. In Kelsen's case, it does not really concern an 'ideology' as tempting as it would be to discard him simply as a political reactionary. It has much more to do with the logical framework with which he validates his epistemology. In other words, it has more to do with the way in which he insists that we follow a certain positivistic method lest we end up with something deemed 'unscientific'. The strength and weakness of the pure theory of law is its obsessive belief in the emancipatory potential of scientific knowledge, and this belief seems to justify Kelsen's insistent claim that all legal research be 'pure'.

How does Kelsen, then, construct his 'normative tradition'?

In another instance, Kelsen claims that legal research must be 'normological'.³⁶ His thorny term brings together the two distinct claims that his pure theory of law makes. Firstly, he asserts that, unlike the main bulk of the social sciences that study factual social phenomena, law is a normative discipline. This meaning of the word 'normative' simply means that law's object of study is legal norms. For Kelsen, law as an academic discipline is normative in much a similar way as descriptive ethics that studies ethical norms without really telling us how we ought to act. We can, for example, study how changes in public morality relate to attitudes towards minorities without assessing the resulting attitudes normatively one way or another. Similarly we can study the ideals of democracy that inform views on lay participation in law, but we need not necessarily take a stand as to whether we should endorse one or the other ideal. The object of study is a normative phenomenon even if the science that studies it can only describe it.

But secondly, Kelsen also claims that legal norms, the object of the normative discipline, must be in logical relationships with one another. Primarily Kelsen understands this 'logical' requirement to mean that every valid norm

³⁶ I have dealt with this question from a slightly different perspective elsewhere. See Panu Minkkinen, 'Why Is Law a Normative Discipline?: On Hans Kelsen's "Normology"' (2005) 11 Res Publica 235-49.

must by necessity be inferred from a higher norm. Because the factual is so categorically distinct from the normative — the ‘is’ from the ‘ought’ — Kelsen insists that a norm cannot be ‘logically’ inferred from factual circumstances. We cannot, for example, establish that a given legal norm is valid because it is either factually enacted by the legislative will of Parliament or factually observed in the so-called real world. As a legal norm, a statute can be valid only if a higher norm has authorized the required legislative act. For Kelsen, such inter-normative relations are the ‘logic’ of law as a normative discipline.

This is where the allegedly descriptive pure theory becomes prescriptive.

Legal norms and their logical relationships make up law as a legal system, a layered or hierarchical structure that ascends from lower norms to ever higher norms until it reaches the hypothetical and presumed basic norm sitting at the summit of the structure. The logical character of the legal system does not necessarily refer to the so-called real world because statutes do not have to display the same ‘logical’ quality. The systematic logic is first and foremost a prerequisite of law as a science.

Notwithstanding the diverse social conventions that tend to acknowledge one approach to law as an ‘authority’ while disregarding others, legal doctrine — the ‘dogmatic’ tradition on the Continent, ‘black letter’ in the English-speaking world — often expresses its demands for such a systematic logic through conceptual, epistemological and methodological rules that the legal researcher must take into consideration if she wishes her work to be acknowledged as law. These rules are, then, normative to the extent that they ‘ought’ to be followed, and in Kelsen’s scheme they constitute a second normative structure in addition to legal norms proper. So there must accordingly be two normative structures: firstly, the legal norms that constitute the object of the pure theory of law and that are merely scientifically described, and secondly, the systematic logic that the study of these norms requires and that the researcher is expected to follow. The requirement to observe and to follow a legal method belongs to this second normative structure.

Kelsen’s pure theory of law is much richer and more complex than the preceding overview suggests. But for the sake of argument, allow me to condense the second normative structure, that is, all the different conceptual,

epistemological and methodological rules that Kelsen formulates about law as a scientific discipline into a single normative claim: 'Legal research ought to be based on a pure theory of norms'. We can modify this claim into more familiar variations, as well: 'For the purposes of research, only positive law can be regarded as law'. Or: 'A PhD in law on lay participation should begin with an analysis of the relevant primary legislation.' Kelsen serves here merely as an example, for similar normative claims as to how legal research 'ought' to be done can be found regardless of what more or less conventional tradition one is talking about. A researcher with a socio-legal bent may well maintain that 'the study of law ought to be founded on verifiable social facts', and someone who finds Dworkin persuasive might claim that 'law ought to concern itself with legal interpretation emphasizing liberal political values'. Even the more orthodox strains of critical legal research make similar normative claims such as 'legal norms ought to be analyzed as part of an oppressive political economy'. Regardless of what the contents of these claims are, they all convey a tradition in terms of norms. They express themselves as normative traditions that 'ought' to be recognized and upheld. And as such, they also regulate and moderate any demands for departures into other directions.

The legal critic could, perhaps, reject or disregard a given tradition simply by referring to its conservative or conformist tendencies. But that would be the easy way out. If the pure theory of law imposes itself on the legal researcher as a normative tradition that 'ought' to be upheld by following certain conceptual, epistemological and methodological rules, then its normativity must lie in the way in which it constructs the logical framework through which these rules are established and communicated. In other words, the scientific logic of legal research that Kelsen elaborates and advocates makes law a normative and prescriptive discipline that tells the researcher what she 'ought' to do.

How does, then, the pure theory of law with its conceptual, epistemological and methodological rules address us? How does it capture us into a world where we are told what to do?

The phenomenologist philosopher Edmund Husserl (1859 — 1938) claims that the scientific logic of a discipline is always normative because its aim is to assess the extent to which the discipline in question — in our case law —

measures up to its own 'idea'. In other words, it tells us what the 'legal' in 'legal research' is and sets this idea of the 'legal' as something that we should aspire to. Logic, then, both evaluates a discipline in relation to its ideal form and conducts it into that direction³⁷. In, for example, Kelsen's case, the claim that 'legal research ought to be based on a pure theory of norms' presupposes that one approach in legal research may be 'purer' than another, and that there may even be approaches that do not live up to even the minimum requirements of a 'pure' theory. In addition, the measuring of different approaches in legal research implies that, to stick with our example, a 'purer' approach is in some way superior to an approach that is 'less pure': it is 'more legal', 'more accurate', 'more scientific', 'more useful', and so on. All in all, the evaluations and judgements are normative for they all suggest how legal research 'ought' to be conducted.

For Husserl, these evaluations and judgements form together a normative hierarchy that ends up being very much like Kelsen's hierarchy of legal norms where the validity of a lower norm was always inferred from a higher one. Evaluating, for example, the 'purity' of a particular approach in legal research is namely always done in a comparative mode, in relation to an approach that is either 'purer' or 'less pure' than the one being evaluated. Claiming, for example, that 'the level of purity in approach x is high' implies that there is an approach where the level is lower, for otherwise the assessment would have been impossible. And just like Kelsen, Husserl also claims that in making such comparisons one must presuppose a basic norm, a hypothetical and even fictive highest norm at the top of the hierarchy that is the origin and the source of all normative validity within the structure. Any claim about the level of purity presupposes the existence of something called 'purity' even if we can't say exactly what it is. The basic norm is, then, not an 'existing' norm but a presupposition required in any normative discipline.³⁸

³⁷ Edmund Husserl, *Logical Investigations. Vol 1. Prolegomena to Pure Logic*. Trans. JN Findlay (Routledge & Kegan Paul, London 1970) 70-2.

³⁸ Husserl, *Logical Investigations*, 85-6.

But unlike Kelsen, Husserl identifies two distinct functions in his basic norm. Firstly, the basic norm has what Husserl calls a 'regulative' function. In the case of logic, the basic norm establishes the validity with which the various normative evaluations and judgements within the hierarchy can perform their measuring function and direct a given approach towards the ideal form of the discipline. By doing so, the basic norm produces unity and cohesion within the discipline, and as such, it contributes to the development of a disciplinary tradition. So, for example, the 'logic' of the pure theory that includes all the different conceptual, epistemological and methodological rules that the legal researcher is supposed to take into account gradually directs law as a discipline into a particular direction.

But secondly and more importantly, Husserl's basic norm also includes within itself a 'constitutive content'. For if one claims that, to once again stick with our example, 'legal research ought to be based on a pure theory of norms', the claim simultaneously implies that such an approach, namely a 'pure theory of norms', has something unique about it. It must by necessity somehow stand out from all other approaches.³⁹ And for Husserl, this uniqueness, whatever it may substantially be, cannot be normatively determined through the regulative function of the basic norm, through claims, rules and propositions that tell us what we 'ought' to do if we wish our approach to be acknowledged as, for example, legal research. In order to say something significant about its normative object, law requires a theoretical elaboration of its own 'uniqueness', of its 'idea'. To paraphrase Husserl, all normative disciplines require knowledge about certain non-normative truths.

So in Husserl's terms, Kelsen's 'normological' tradition of legal research with its emphasis on the necessity to follow prescribed methodological rules seems to only recognize the regulative function of the basic norm. Indeed, for Husserl, such a normative tradition could not even be scientific in any profound meaning of the word. Legal research would, if that were the case, be reduced to a mere regulated practice the premises of which are determined elsewhere. The

³⁹ Husserl, *Logical Investigations*, 87-8.

legal researcher would simply be blindly following her methodological rules without ever reflecting on what they are meant to achieve and why.

The challenge from tradition

So in the positivistic variants of legal research, Kelsen included, tradition is often understood as such a set of obliging rules that regulate the work of the researcher and direct it towards something that is itself seldom seriously questioned. In other words, the normative tradition of legal research will readily tell the researcher what she 'ought' to do, but it is less willing to engage in any 'navel-gazing' or reflections about its own uniqueness or its 'idea' even if the individual rules must by necessity be inferred from that uniqueness and not vice versa. The requirement to adopt and to elaborate a method of research to investigate, for example, lay participation in law is typically such an obliging rule. By deviating from it, the researcher runs the risk of having her work excluded from the main body of legal research as 'impure', 'unscientific', 'not law', or with a number of other pejorative condemnations. These are normative traditions of research, traditions that regulate the production of legal knowledge delimiting the options of critical departures and consequently also keeping a check on what is to be regarded as scientifically relevant and what not. And to reiterate, the orthodox strains in critical legal research are no different.

My claim is that this type of normative and 'regulative' tradition that is not complemented by genuine theoretical insights about the discipline in general is not a tradition at all. Even if the demands of a normative tradition of research could be justified from a practical point of view, it is never enough. Without the possibility to address the uniqueness of the discipline, the 'idea' of law, if you will, the researcher is lost blindly following externally imposed rules and regulations like methods without knowing why they are there. And in addition, one must also be able to question the very notion of a tradition.

What is, then, tradition? How does tradition display itself in a discipline like law that is to a large part based on interpreting texts?

Hans-Georg Gadamer (1900 — 2002) is considered as the founder of philosophical hermeneutics, that is, the philosophy of understanding and interpretation. It is well known that Gadamer modeled his philosophical hermeneutics on how lawyers intuitively work with their legal texts:

Legal hermeneutics is able to point out what the real procedure of the human sciences is. Here we have the model for the relationship between past and present that we are seeking. The judge who adapts the transmitted law to the needs of the present is undoubtedly seeking to perform a practical task, but his interpretation of the law is by no means on that account an arbitrary re-interpretation. Here again, to understand and to interpret means to discover and to recognise a valid meaning. He seeks to discover the 'legal idea' of a law by linking it with the present.⁴⁰

It is this linking of past and present that Gadamer understands as tradition. And he has often — too hastily, in my mind — been accused of conservatism because of this.⁴¹ Indeed, the word 'tradition' does easily invoke such thoughts. But this tradition is something quite different. In one of his rare poetic moments, Gadamer describes how the interpreter becomes aware of tradition in the process of understanding. When we confront any given text, we approach it within a particular situatedness that Gadamer calls a horizon. No one can read texts in a vacuum, and our understanding is always conditioned by both our social and our individual circumstances. A horizon may always be changing, but it includes within itself all the prejudices and expectations with which the interpreter approaches her text. For example, I am an educated white man from a Northern European middle-class background, and that will inevitably affect the way in which I relate to lay participation in law. If we are, for example, reading

⁴⁰ Hans-Georg Gadamer, *Truth and Method* [1960]. Trans. J Weinsheimer and DG Marshall (Continuum, London/New York, NY 2004) 292-3.

⁴¹ See e.g. John D. Caputo, *Radical Hermeneutics. Repetition, Deconstruction, and the Hermeneutic Project* (Indiana University Press, Bloomington, IN 1987) 108-19.

legislation on lay participation in law, a self-professed legal critic will be looking for different emphases than her more conformist counterpart. For my part, I may not see it as a uniquely positive phenomenon or as something contributing towards democracy. Because of my situatedness in the ideals of the Scandinavian welfare state, I have seen how a well-educated and socially representative career judiciary has been able to promote those ideals, and I may be less keen to see uninformed lay interference than someone from, say, Britain who may have an innate distrust of an elite judiciary. Although we all approach texts from our particular horizons, Gadamer insists that if the interpreter genuinely wishes to understand her text, she must first isolate and suspend her prejudices until they have properly demonstrated their worth: Is lay participation really 'uninformed'? Does a socially representative career judiciary really endorse welfare state values? And so on. Structurally this suspension is what Gadamer calls a 'question':

The essence of the question is the opening up, and keeping open, of possibilities. If a prejudice becomes questionable, in view of what another or a text says to us, this does not mean that it is simply set aside and the other writing or the other person accepted as valid in its place. It shows, rather, the naiveté of historical objectivism to accept this disregarding ourselves as what actually happens. In fact our own prejudice is properly brought into play through its being at risk. Only through its being given full play is it able to experience the other's claim to truth and make it possible for he himself to have full play.⁴²

Not, then, by discarding my personal prejudices from the outset as the requirement for scientific objectivity usually requires, but by putting them to the test in a question. So not by bracketing out my personal views on the political benefits of a trained legal bureaucracy merely because they are 'personal', but by setting them up against contrasting views on, for example, how that legal

⁴² Gadamer, *Truth and Method*, 266.

bureaucracy in fact emphasizes certain middle-class values and policies that I may be blind to.

How does the question unravel itself?

A text, even if it may be distant in time or in space, suddenly speaks to us. The pledge of a victim to crime in her statement to the court, a feminist analysis of how gender configures in the world of law, even a work of literature like a tragedy by Sophocles or Shakespeare; suddenly a text 'resonates'. It 'makes sense', and the interpreter becomes aware of a connection even if a conventional understanding of who she is and what she does would suggest that the text in question is rather distant in relation to the what the legal researcher should be doing. The prejudices of the legal researcher's own normative tradition may want to resist the resonance through exclusion, but the legal critic may be willing to risk her own prejudices by putting them into play and by allowing the other to have her say. Face to face with such seemingly distant familiarities, the legal researcher can do one of two things. She can either disregard them because her discipline informs her that they are 'unscientific', 'irrelevant', 'methodologically unsound', or what have you, or, as Gadamer suggests, she can embrace them and put them to the test against her own prejudices before deciding about their worth.

But this can work in the opposite way, as well. Being politically impatient as we often are, we may feel tempted to discard the 'baggage' of a tradition that seems to be preventing us from getting on with things. But engaging with, for example, the pure theory of law may also clarify how the tradition of legal positivism more generally exercises its normative hold over the production of legal knowledge. We may be able to question the hostility of legal positivism towards certain approaches in law, its corresponding fascination with regulated knowledge and the method that will supposedly produce it, its belief in the explicative power of formal concepts, and so on. And by putting such issues into play in the question, we may well get a valuable glimpse of where we could be ourselves heading.

Perhaps it is unusual to suggest that a 'humanist' approach like hermeneutics could offer a model for the legal critic that goes beyond mere criticism. But even some approaches that are more commonly associated with

critical legal research share a certain kinship. For example, Silja Freudenberger suggests that Gadamer's hermeneutics offers an inspiration and ally — but not necessarily a model — for feminism on many interrelated levels.⁴³ I will re-formulate Freudenberger's more general observations here with specific reference to legal research. Firstly, feminist approaches to law and hermeneutics both depart from a critique of the propositional concept of knowledge and reject the methodological ideals of modern science that underpin that concept. The starting point of both more conventional approaches to legal research and Kelsen's pure theory of law is, of course, quite the opposite: to construct legal propositions and concepts by adhering to a scientifically sound methodology. Secondly, feminist approaches to law and hermeneutics both endorse a non-patronizing and open relationship with the other and what she may have to say whereas conventional approaches to legal research do not seem to include any such dialogical elements. The tone of conventional legal research is exclusive rather than inclusive as Kelsen's notion of 'purification' already reveals. Thirdly, feminist approaches to law and hermeneutics both include a fundamental recognition of the historical, cultural and social situatedness of interpreters rejecting any claims to the type of universal and unattached perspective that the 'objective' ideal of conventional approaches suggests. Fourthly, feminist approaches to law and hermeneutics both recognize that, on account of the fundamental situatedness of all interpreters, the existence of differing voices is not considered as a flaw or a weakness but, rather, as an inevitability, whereas Kelsen's brand of positivism would rather 'purify' legal research from all such deviations. Finally, feminist approaches to law and hermeneutics both call for reflection on one's own position and one's vested interests in research and academic work whereas the only explicit aim of conventional approachers to law is the supposedly disinterested pursuit of knowledge.

So the legal researcher does not partake in tradition by prudently following the normative demands of her discipline and by enclosing herself into

⁴³ Silja Freudenberger, 'The Hermeneutic Conversation as Epistemological Model' in L Code (ed), *Feminist Interpretations of Hans-Georg Gadamer* (Pennsylvania State University Press, University Park, PE 2003).

its limited world but, as Gadamer expresses it, by allowing the other to speak. This is by no means an uncritical encounter. Far from it. Within tradition, the legal researcher encounters the other with her own prejudices, and the encounter takes place in the form of a question. The legal researcher's prejudices are the 'legal baggage' that she by necessity carries with her, and through questions she evaluates whatever it is that she has encountered by understanding it in a particular way: she unravels history 'as a legal researcher', she conceptualizes society 'as a legal researcher', she reads literature 'as a legal researcher', and so on. But at the same time, she develops an awareness of the baggage that she is carrying with her. Instead of throwing it all hastily overboard and proceeding to criticize perhaps prematurely, the encounter invites her to review what her position 'as a legal researcher' involves and whether it contributes anything valuable to her understanding of the world.

Resonance

In other words, the legal researcher is part of a tradition only if she can question the other and be herself put into question by it. So one possible response to the question 'How can critical legal research change law?' could well be: the legal critic can change law by partaking in its tradition. But this requires that tradition is not understood in a normative way. The normative tradition of legal positivism in general and Kelsen's pure theory of law in particular both oblige the legal researcher to follow prescribed conceptual, epistemological or methodological rules. Research into, for example, lay participation in law must be conducted in particular ways, and the sanction for doing otherwise is a negative assessment of the results. As such, these rules do not allow for the resonance of the question. On the other hand, a dialogical tradition such as the legal critique that I am advocating here offers the researcher the possibility to allow that resonance to grow into ever new questions the answers to which lead to yet new questions.

Tradition, then, reveals itself to the legal researcher in this resonance, in the seemingly unlikely familiarities that she first questions through her own

prejudices and that consequently also put her and her prejudices into question. Through the resonance of tradition the legal critic can become aware of the self-imposed limitations that prevent her from seeing the wider picture. But her response is not an alternative 'critical' legal method that would limit her in more or less similar ways but, rather, an attitude and a willingness to continuously question and to be put into question.

So hopefully my own fascination for the Germans is at least partly justified. There may very well be more conventional or established critical perspectives like Marxist or feminist approaches that I should at least consider as my starting-points. But there is also an argument to be made for developing critical departures from the tradition that one comes from by engaging with it in critical dialogue. Otherwise the legal critic runs the risk of unwittingly carrying that tradition with her by blindly swapping one normative tradition for another.

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